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May 27, 2022

Via Electronic Mail: rule-comments@sec.gov

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Request for Extension of Comment Period for SEC's Proposed Rulemaking on Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer, File No. S7-12-22

Dear Ms. Countryman:

We are responding to the request of the Securities and Exchange Commission (the "Commission") for comments to the proposed rules to revise and expand the definitions of "dealer" and "government securities dealer" under, respectively, Sections 3(a)(5) and 3(a)(44) of the Securities Exchange Act of 1934, as amended (the "Proposed Rules" and the "Exchange Act") to ask that the Commission extend the period for comments to the Proposed Rules.[1]

Schulte Roth & Zabel LLP is an international law firm with offices in New York, London, and Washington, D.C. Our clients include several hundred investment advisers to private funds that would be affected by the Proposed Rules as well as other investors and market participants that could potentially be significantly impacted by the Proposed Rules. We regularly advise private fund managers with respect to compliance with the Investment Advisers Act of 1940 (the "Advisers Act") and the establishment and ongoing needs of their fund businesses. We also have one of the largest dedicated broker-dealer regulatory and compliance practices in the country that routinely advises on issues regarding the Exchange Act's complex regulatory regime, as well as the requirements of the various self-regulatory organizations regulating broker-dealers.

These comments, while informed by our experience in representing our individual investor, fund, and broker-dealer clients, represent our own views and are not intended to reflect the views of the

[1] SEC Release No. 34-94524 (Mar. 28, 2022), 87 Fed. Reg. 23,054 (Apr. 18, 2022) (the "Proposing Release" or the "Proposed Rulemaking").

clients of the firm.

Request for Study of Impact on Private Funds and their Advisers

As drafted, the Proposed Rules would have a substantial impact on private funds and the opportunities for investors in such funds. Structurally, the majority of hedge funds would be within the scope of the Proposed Rules. While the Proposed Rules exclude advisers that only exercise investment discretion over a private fund, they do not exclude advisers that are deemed to control the funds because of their voting rights. The majority of U.S. hedge funds are structured for the adviser to maintain voting rights, even where it has little or no proprietary capital invested in the fund. By categorizing such funds as the adviser's "own account," the Proposed Rules would cover many private fund advisers. The test for trading activity in the Proposed Rules also will broadly impact private funds and their advisers. By using qualitative standards with ambiguous terms, the Proposed Rules would make it impossible for many hedge funds to be certain enough to continue their trading without registering as a dealer. A wide range of investment strategies could easily implicate the qualitative tests: traditional long/short funds, statistical arbitrage strategies, convertible arbitrage strategies, quantitative trading strategies, and multi-strategy funds. Faced with the onerous and impractical requirements of being a registered dealer, some private fund managers may simply cease engaging in activity that would require dealer registration, depriving investors of investment opportunities and depriving markets of liquidity.

In these circumstances, we believe that further study should be undertaken before creating such a significant impact. In the Proposing Release, the Commission identifies the lack of data as to the number of firms that would be affected and the impact on investors and market liquidity. We believe such data is critical to rulemaking in this area and therefore request withdrawal of the Proposed Rule, or of the portion applicable to private funds and their advisers, while such study is undertaken.

Request for an Extension of the Comment Period

We respectfully join in the requests for an extension of the comment period for the Proposed Rules submitted by the U.S. House of Representatives Committee on Financial Services, the Managed Funds Association, the Alternative Investment Management Association, and the Blockchain Association. The Proposed Rules raise serious issues regarding whether the Commission has the statutory authority to redefine and to expand the definitions of "dealer" and "government securities dealer" through rulemaking and, to the extent that the Commission could redefine and expand these definitions through rulemaking, the Proposing Release is deficient under the Administrative Procedure Act[2] and Sections 3(f) and 23(a)(2) of the Exchange Act as it contains materially flawed cost benefit assumptions, uses ambiguously defined terms, and fails to give interested parties sufficient factual detail to permit them to comment meaningfully[3] or reasonably asses the "agency's final course in light of the initial notice."[4] We believe interested parties should be given at least 120 days following the publication of the Proposed Rules in the Federal Register to highlight the complex legal issues noted above to address the uncertainty and risk to market participants created through the Proposing Release's use of ambiguous terms, and articulate the

[2] 5 U.S.C. § 551 *et seq.*
[3] *See* Section 553 of the APA
[4] *Kern Cty. Farm Bureau* v. *Allen*, 450 F 3d 1072, 1076 (9th Cir. 2006) (internal citation omitted).

impact to the U.S. securities market that will result from the reduced liquidity, increased volatility, and reduction in capital formation that will result if these rules are adopted, as well as the broader impact to the U.S. economy.

The Proposed Rulemaking Exceeds the Commission's Statutory Authority

The term "dealer" is defined as "a person engaged in the business of buying and selling securities ... for such person's own account through a broker or otherwise." The Proposed Rules would redefine the term "dealer" to include investment advisers that exercise trading authority over their clients' accounts. Carved out from the Proposed Rules are advisers that do not control the private funds they advise, but there is no connection between controlling – but not owning – an account and that account being the party's "own account". The Proposing Release notes that a private fund adviser typically has an economic interest in the performance of its fund client. But it is almost always the case that an adviser to a fund has such an economic interest. The fact that a fund manager may stand to benefit from the performance of a fund it advises does not somehow make the fund the adviser's "own account." The Proposed Rules' attempts to impose dealer registration on the funds themselves also is misguided. The practical implications are obvious – funds have no officers or other personnel such that they could not be "engaged in a business" of effecting securities transactions for their own account.

The Administrative Procedures Act, 5 U.S.C. § 706 (the "APA"), and well-established case law, make clear that the Commission lacks authority to modify or rewrite statutory definitions. *See generally Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Proposed Rules would improperly expand the statutory definition of "dealer" beyond the decades-old designation of one who is buying and selling securities for such persons own account through its new definition of "own account," which, as further discussed above, captures accounts advised by investment advisers, such as private funds, and their advisers. The definition of "own account" is not a mere interpretation or construction of the statute because it expands the definition of "dealer." An agency (the Commission) "has no power to correct flaws that it perceives in the statute it is empowered to administer," *Natural Res. Def. Council v. EPA*, 822 F.2d 104, 131, nor can it alter that definition where "Congress makes a clear statement as to how categories are to be defined and distinguished." *AK Steel Corp. v. United States*, 226 F.3d 1361, 1372 (Fed. Cir. 2000); see also *Fin. Plan. Ass'n v. S.E.C.*, 482 F.3d 481 (D.C. Cir. 2007) (concluding the Commission exceeded its rulemaking authority by expanding certain exemptions concerning broker-dealers).

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We would be pleased to respond to any inquiries you may have regarding our letter or our views on the Proposed Rules more generally. Please feel free to direct any inquiries to Kelly Koscuiszka, Bill Barbera, or Derek Lacarrubba at (212) 756-2000.

Respectfully submitted,

SCHULTE ROTH & ZABEL LLP

cc: The Honorable Gary Gensler, SEC Chairman
The Honorable Caroline Crenshaw, SEC Commissioner
The Honorable Allison Herren Lee, SEC Commissioner
The Honorable Hester Peirce, SEC Commissioner
Dr. Haoxiang Zhu, Director, Division of Trading and Markets